In the

Supreme Court of the United States

OCTOBER TERM, 1942

No.

G. B. HOWELL, ET AL, *Petitioners*

VS.

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INC., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Opinions Below

The opinion of United States District Judge, Walter E. Lindley, appears at record, page 207, and is reported in 40 F. S. 316.

The opinion of the Circuit Court of Appeals, written by Circuit Judge Kerner appears at Record, page 283, and is reported in 127 F. (2d) 1006.

Jurisdictional Statement

Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, ch. 229 (43 Stat. 938) 28 U.S.C.A., Section 347(a).

Statement of the Case

To avoid repetition, we refer to the STATEMENT OF THE MATTER INVOLVED, as contained in the preceding Petition for Writ of Certiorari, page 2.

Specifications of Errors

1. The rights of respondents, and their predecessors in title, to occupy and use the surface of the land for the exploration for and production of oil and gas had terminated under the limitations in the deed, and therefore, the Circuit Court of Appeals erred in holding that the granted right to the oil and gas was in fee and was not terminated when the grantee lost all his rights to use or occupy the surface for the purpose of exploring for and producing the oil and gas.

2. Respondents' rights to use and occupy the surface for operations for and production of oil and gas having terminated in 1926, by virtue of the limitation in the deed, the Circuit Court of Appeals erred in holding that an oil and gas lease executed to petitioners by the grantors (J. P. Minier, et al) in the deed, did not vest said lessee with the

right to use and occupy the surface of the land for the purpose of operating for and producing oil and gas therefrom, and with the title to the oil and gas when produced.

Argument Under Specifications of Error 1 and 2

The decision of the Circuit Court of Appeals is in conflict with the rule of decision in Illinois that no greater right in oil and gas can be either owned or conveyed than the right to use the land to drill and operate therefor, and after production become the owner, because it adjudicates that respondents own the oil and gas in fee although they have lost their right to operate and drill upon the land to produce it.

The decision of both the District Court and the Circuit Court of Appeals that the rights of the grantee under said deed and of respondents as his successors, to use the surface of the land for the purpose of operating for and producing oil and gas terminated in 1926, two years after the mine shaft referred to in the deed had been completed, is correct and is not here questioned. An analysis of the language of the deed and the purpose to be accomplished by the two-year clause removes any possibility of questioning that part of the decision of the Circuit Court.

Although respondents are denied the right to use the land for the purpose of operating for oil and gas and will be required to cease operations and plug the nine wells located upon the land (R. 226), nevertheless that court holds that:

> "In our case it is clear that Minier conveyed to Williams, without limitation or restriction, all of his rights in the oil and gas beneath the land. The granted right was in fee and it was not forfeited when the grantee lost all of his rights to the surface. He is entitled to this interest against the owner of the surface * * * ".

The quoted language from the court's opinion is not the law as declared in the Illinois decisions concerning the ownership of oil and gas. In fact, the Illinois cases cited by the Circuit Court of Appeals in its opinion reach a conclusion directly contrary to that announced by that Court in the foregoing quotation.

The Court recognized that the Supreme Court of Illinois has held in the following cases that oil and gas in place are not subject to absolute ownership and that no title vests until they are reduced to possession: *Watford Oil Company vs. Shipman*, 233 Ill. 9, 12; *Poe vs. Ulrey*, 233 Ill. 56, 62; *Ohio Oil Company vs. Daughtee*, 240 Ill. 361, 367; *Trigger vs. Carter Oil Company*, 372 Ill. 182, 185; *Updike vs. Smith*, 378 Ill. 600, 604; *Carter Oil Company vs. Liggett*, 371 Ill. 482; *Bruner v. Hicks*, 230 Ill. 536.

The substance of these cases is that the grantee of oil and gas, who is given the right to use the land for its production, has a freehold estate in the land itself, not because he owns the oil and gas, but because he has the right to use the land for its production. This same reason was used in *Transcontinental Oil Company vs. Emerson*, 298 Ill. 394, where it was held that an oil and gas lessee had a corporeal

freehold estate. The court in the latter case said (Page 648):

> "* * *The fugacious nature of oil and gas * * * renders them not susceptible of ownership distinct from the soil,* * *".
>
> (P. 649).
>
> "They belong to the owner of the land only so long as they remain under the land, and his grant of them to another is a grant only of such oil and gas as the grantee may find, and no title to it vests in the grantee until it is actually found. The conveyance, however, of the right to enter upon the land for the purpose of speculating and operating for oil and gas, laying pipe lines * * is a conveyance of an interest in the land itself, which, if of indefinite duration, is a freehold estate in the land."

A summary of these decisions, declaring the law of Illinois, discloses that the actual interest of a grantee of oil and gas is not "ownership" of these minerals, but rather is a grant of the right to the use of the surface of the land for the purpose of exploring for and producing oil and gas, which is the same rule recognized in California, Oklahoma, and several other states, frequently referred to as the "Non-Ownership Rule". We quote briefly from the case of *Richfield Oil Company vs. Hercules Gasoline Company*, California, 297 Pac. 73, 75, where the court says:

> "* * * there can be no grant or conveyance of oil or gas in place separate and apart from the right to go upon the premises and extract them."

Thus it is clear that in Illinois the respondents cannot own the oil and gas separate and apart from the right to go upon the premises and extract them. Since this is true, when, by the express limitation in the deed, the respondents lost the right to go upon the premises and extract them, necessary no title in the oil and gas, fee, or otherwise, remained in them.

The very essence of the oil and gas right, the thing which is the subject of ownership or conveyance under the Illinois law (as well as the other "non-ownership" states), is the right to conduct operations on the land for the production of oil and gas. Thus in *Bruner vs. Hicks*, 230 Ill. 536, 542, the court said:

> "It may be conceded that the title to the oil and gas in said lands did not vest in the appellants, as assignees of the said lease, until the oil and gas were discovered and appropriated by them; still the right to occupy the premises for the purposes aforesaid, conferred * * * * a present vested right in said premises."

In *Poe vs. Ulrey*, 233 Ill. 56, 61, 62, the court said:

> "The freehold estate of homestead was involved in the Circuit Court under the pleadings, not because the lease of oil and gas was a conveyance of an interest in the homestead, but because of the rights granted in the surface."

And in *Gillespie vs. Fulton Oil & Gas Company*, 239 Ill. 326, 331, the court held:

> "The complainant had no right to the premises nor even to the oil and gas under them. What he acquired

> by the lease was merely the right to go upon the premises and explore for oil and gas, and, if found, to produce them according to the terms of the lease (Watford Oil and Gas Company vs. Shipman, 233 Ill. 9)."

Thus, it seems that when respondents are denied the right to use the land for the purpose of producing oil and gas, they are deprived of the very essence of what has been held to be their only right, and that nothing remains which has ever been recognized by the Illinois Courts as an interest or estate in oil and gas.

In *Mills & Willingham, Law of Oil and Gas* (1926 Edition) Section 19, Page 29, it is expressed in this language:

> "It would seem, therefore, that a denial to the owner of the mineral right, by the owner of the land, of the use of the surface for the purpose of exploring for oil and gas is a denial of the incorporated right itself, and would constitute an adverse possession under the statute of limitation."

In *9 University of Chicago, Law Review 345*, is is a comment upon the decision of the Circuit Court of Appeals in the case at bar. After reviewing the Illinois decisions, it concludes that "both the right, express or implied, to use the surface and the right to take the oil and gas must be present in order to sustain a lease or grant of these minerals."

The fallacy of the conclusion reached by the Circuit Court of Appeals is demonstrated by the following quotation from its opinion, supported by an Illinois decision:

> "To be sure, ordinarily the conveyance of the interest in coal, oil and gas would carry with it the implied right to enter upon the grantor's land and to use so much of it as necessary for the full enjoyment and benefit of the property granted. Threlkeld v. Inglett, 289 Ill. 90. But clearly that right may not be implied, when the parties by their agreement have limited the surface privileges."

Thus, the court holds that an ordinary conveyance of the interest in the oil and gas would carry with it the implied right to enter upon the land and use so much of the surface as was necessary for the full enjoyment of the property conveyed, but nevertheless, it holds that such right to use the surface will not be implied when the parties have limited the use of the surface privileges to a specified time, or to the happening of a contingency. But the court failed to apply the law of Illinois in construing the latter type of instrument. Under the law of Illinois, when the right to use the surface for operating and producing oil and gas terminated by express limitations in the grant of such minerals, any fee or other title or right to the oil and gas likewise terminated.

The Court should not uphold respondents title to oil and gas after expiration of their right to use the surface to obtain them: Since all practical means of producing, using, and enjoying the oil and gas have terminated, a condition should be implied terminating their oil and gas rights.

The rule just stated is applicable in states which recognize the oil and gas "ownership rule", and even where hard minerals, as coal, are involved, since it is a rule of reason.

The trial court recognized in its opinion (R. 212), that its decision created an "anomalous" situation because neither of the parties to the controversy had the means for practical enjoyment of the oil and gas rights, but on the contrary, each only had enough rights to prevent the other from enjoying them.

In the opinion of the Circuit Court of Appeals (R. 287), the court indicated an intention to disregard the fictitious theory of the ownership and non-ownership surrounding the title to oil and gas, in these words:

> "These recognitions of property in oil and gas determine the rights of the individuals in the fugacious minerals underlying the land; they state what one individual may do and what another may not. It is for these incidents that parties bargain, not for titular 'absolute ownership', of the oil and gas in place." (Emphasis ours).

By this language, the court clearly holds that the right to oil and gas follows the person having the right to do the things necessary to operate for and produce it. These rights are the "incidents" for which the parties bargain, not an empty title to the oil and gas with no right to enjoyment thereof by operation and production.

But in concluding its opinion, the court entirely ignored its sound reasoning quoted above, when it said:

> "The granted right was in fee and it was not forfeited when the grantee lost all of his rights to the surface. He is entitled to this interest against the owner of the surface, as well as against strangers, to the tract."

By this language, the court reverts back to recognition of a barren, useless title in fee which serves respondents only to the extent that they can prevent petitioners from producing the oil; and, of course, at the same time, petitioners can prevent respondents from operating for and producing the oil.

It was suggested by the trial court (R. 212) that directional drilling might be considered as a means whereby respondents could obtain the oil, although there was no evidence to this effect offered in the trial of the case. On the contrary, the court is entitled to take judicial knowledge from periodicals recognized by the oil industry, that controlled directional drilling was unknown until 1930, when it was first used at the Huntington Beach Field. "Underground Well Surveying, Directed Drilling, Side Wall, Sample and Polar Core Orientation" by G. L. Kotheny, Page No. 866-12E, American Petroleum Institute, published April 18, 1941; *Rhomberg vs. Texas Company*, (Ill. Sup.) 40 N.E. (2d) 526; *Summers Oil and Gas* (Permanent Edition, 1938) Vol. 1, Paragraph 26, Page 65; "Controlled Directional Drilling" by J. C. Albright, published by The Petroleum Engineer, January 1935, Page 21; "Theory and Practice of Directed Drilling" by R. E. Allen, Assistant Oil Umpire of California, published by Petroleum Development

and Technology, 1934, Page 34; Petroleum Investigation—Hearings before a Subcommittee on Interstate and Foreign Commerce, House of Representatives—73rd Congress, H. Res. 441, September 17-22, 1934.

That the court may take judicial notice from such publications is held in *T. & P. Railroad vs. Pottorff*, 291 U.S. 245, 254, 78 L. Ed. 777, 782.

The condition or limitation on respondents' right to operate on the land for oil and gas became operative in 1926, and if our argument is correct, their oil and gas rights terminated at that time. The subsequent discovery of directional drilling cannot rejuvenate their estate. The fact that the controversy did not reach the courts until 1941, cannot be ground for a different decision than would have been reached had the trial taken place in 1926.

Certainly, directional drilling was unknown in 1914, when the deed was delivered, and it is the intention of the parties and the circumstances surrounding them at that time which must be considered in construing this deed; it is the means of production then known and contemplated by the parties which must determine whether they intended that the grantee's oil and gas rights should endure beyond his right to produce them.

It is our contention that because the limitation, regardless of the non-ownership theory of oil and gas which applies in Illinois, and even if hard minerals were involved, after it became effective, expressly terminated all respon-

dents' rights to use the surface of the land to operate for oil and gas, and because this deprived respondents of all **practical** means of producing oil and gas, that a condition must be **implied** terminating all respondents' oil and gas rights.

In *Benedum-Tree Oil Company vs. Davis* (Ohio CCA) 107 F. (2d), 981, certiorari denied, 310 U.S. 634, the court says:

> "An implied condition may be inseparably annexed to a grant from its essence and constitution, although no condition is expressed in words."

Accord: *Logan Natural Gas & Fuel Company vs. Great Southern Oil & Gas Company*, 126 F. 623.

In *Butler v. McGorrisk*, 114 Fed. 300, Butler sued McGorrisk, and others, to recover the value of coal mined after May 1, 1891, from under certain land in which all of the coal had theretofore been conveyed to Butler. The deed conveyed "all the coal and the right to mine and remove the same" in the land, but provided, further, that the grantee was "to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date."

After holding that the deed was unambiguous, and that the plaintiff, Butler, was not entitled to recover from the defendants, the court gave its reasons therefor in the following language (P. 302):

> "The right to the coal and the right to mine it are by the terms of the deed indissolubly linked together, and expired together * * * the right to mine and re-

move coal is the very substance of this contract. A limitation upon that right is necessarily a limitation upon the coal conveyed, and the coal conveyed is of no use or utility without the right to mine and remove, and there can be no implied right to mine and remove the coal where the right is expressed and the limitation is expressly put upon the right."

To the same effect are cases construing deeds of standing timber, which limit the time for removal. It is held in those cases that to relieve from "irrational consequences", the time limit on the right of removal must be construed as limiting title to the timber. *Weber vs. Proctor*, 89 Me. 404, 36 Atl. 631; *38 C. J.* 163, 164; *15 ALR* 70, 75, 78—Annotation; *Supplemental Annotations, 31 ALR* 944-954; *42 ALR* 644.

Conditions have been implied in various jurisdictions to enforce implied covenants in oil and gas leases requiring development with due diligence and the drilling of offset wells to prevent drainage. *Pelham Petroleum Company vs. North*, 78 Okla. 39, 188 Pac. 1069; *Sauder vs. Mid-Continent Petroleum Company* (Kan.) 292 U.S. 272, 78 L. Ed. 1255; *Mansfield Gas Company vs. Alexander*, 97 Ark. 167, 133 S.W. 837.

There can be no question but that in the case at bar, the drilling of each of the wells upon the land in controversy was absolutely necessary to recover the oil and to prevent waste. The stipulation under which the wells were drilled "without in any manner whatsoever waiving any of the respective rights and claims as to the merits of the con-

troversy" provided that "all of the parties to this cause agree that **irreparable damage** will ensue unless a further order of the court is entered permitting additional drilling upon the above-described premises * * *" (Emphasis ours) (R. 56, 57). The stipulation provided for eight wells on the eighty acres, or one well to each ten acres (R. 57, 58). The ninth well was necessary to prevent drainage.

The parties themselves have construed the deed as contemplating development for oil and gas only by drilling directly upon the surface of the land.

This suit was instituted by respondents asserting as their only right, the right to drill directly upon the land to produce the oil and gas underlying it. In their complaint (R. 2), they did not allege and did not claim the right to produce the oil by any means other than drilling directly upon the land, and they actually started their first well directly upon the land after a preliminary restraining order had been entered by the trial court (without notice to petitioners) restraining petitioners from interfering with them in the drilling of such well (R. 31). This was before the stipulation.

No evidence was offered by respondents showing that they could obtain the oil and gas by any means other than drilling directly upon the land. This possibility was advanced for the first time by the District Judge in his opinion (R. 207, 212).

It does not even appear that respondents have any adjoining land which could be used by them for the purpose suggested by the trial court.

This case was plead and tried by all the parties upon the basis that the only practical way of producing the oil was by drilling upon the land itself, and it is upon this basis that the case should be decided. This evidences a construction of the deed by the parties themselves that the only means of operating for and producing oil and gas contemplated by the parties to the deed was by operations directly upon the surface. This should be entitled to great weight in the eyes of the court.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors herein pointed out may be corrected; that the decisions of the United States Court should be conformed to the decisions of the State Courts announcing the local law involved; that the decision of the Circuit Court in this case should be conformed to the decision of the Eighth Circuit Court of Appeals in *Butler vs. McGorrisk*, 114 Fed. 300; that the anomalous situation created by the decision of the courts below should be corrected; and that to such end, a writ of certiorari should be granted, and this court should review the decision of the United States Circuit Court of Appeals for the Seventh

Circuit and reverse it to the extent of the errors herein set forth.

Respectfully submitted,

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